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No. .....

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972 72-503

HARRIS TRUST AND SAVINGS BANK, individually, as Executor of the Estate of Gertrude Witbeck Hanlin and as Trustee; EVELYN P. GRICE, MARY T. GARVEY, JOHN A. LOWELL, II, BONNIE TORREY BERTKE, CLARENCE T. TORREY, JR. and MARGARET TORREY McGRATH,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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La Salle Street Press—Chicago/PrinterLink

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OPINIONS BELOW

The United States District Court for the Northern District of Illinois filed an opinion dated October 30, 1970,

which has been reported at U.S. Tax Cas., ¶ 12,732 and 26 Am. Fed. Tax. R.2d 70-6089. A copy of said opinion is appended hereto as Appendix A, pp. App 1-4, *infra.*

The United States Court of Appeals for the Seventh Circuit filed an opinion dated May 19, 1972, reversing and remanding for entry of judgment only against petitioners. That opinion has not been reported but is appended hereto as Appendix B, pp. App 5-12, *infra.*

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 19, 1972. A timely petition for rehearing was denied without written opinion on June 29, 1972. On July 27, 1972 an Order Staying Mandate was issued pending application to this Court for a writ of certiorari. This petition for certiorari was filed within 90 days of June 29, 1972. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court erred in deciding the issue of valuation of an interest for estate tax purposes solely on the basis of the presumptive correctness of a tax assessment where petitioners presented evidence to rebut that presumption?

2. Whether the court in effect deprived petitioners of due process of law in failing to decide the issue of the value of decedent's interest?

3. Whether the court in this federal estate tax controversy was conclusively bound by a state trial court adjudication of property rights when that adjudication was made in response to the mandate of the highest court of the state and when the United States was not a party to such proceeding?

4. Whether the court erroneously construed Illinois law with regard to decedent's power to control devolution of the interest sought to be taxed?

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment Five provides in part:

> ". . . nor shall any person be deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Most of the facts hereinafter stated appear in the stipulation of the parties (R. 29-35) and the findings of the District Court. (R. 128-131) Reference to the record is made specifically as to any fact not in the Stipulation of Facts or the findings. Gertrude Witbeck Hanlin ("Decedent") died testate on April 11, 1952 survived by five children. At the time of her death Decedent was the sole surviving income beneficiary of a trust created by the will of her grandfather Henry Witbeck who died April 11, 1891. Decedent's executors filed a federal estate tax return which disclosed the existence of the trust. They took the position that her interest therein terminated at her death and was therefore not includable in her estate for federal estate tax purposes. A deficiency was subsequently assessed for unpaid estate taxes on the ground that Decedent possessed an interest in said trust at the time of her death that was includable in her estate for federal estate tax purposes. Thus, the issue of includability involved a determination of Decedent's power to control the devolution of a portion of the principal assets of the trust after her death as determined by Illinois law.

On June 16, 1896 Henry J. Witbeck, a brother of Decedent and one of the three grandchildren for whom the trust under the will of Henry Witbeck was established, died

intestate, unmarried and without descendants. The trustees filed a bill in the Circuit Court of Cook County to determine the disposition of his one-third interest in the property of the trust. The Circuit Court entered a decree on October 7, 1897 from which all of the parties in interest took an appeal to the Illinois Supreme Court. That court considered the questions presented and remanded the matter to the Circuit Court of Cook County for entry of a decree not inconsistent with its decision which appeared in *Lombard* v. *Witbeck*, 173 Ill. 396, 51 N.E. 61 (1898). (R. 50-71) On remand the Circuit Court of Cook County entered its decree (R. 72-91) on July 16, 1898. Among other things, that decree gave explicit directions to the trustees as to whom the trustees should convey the real estate interests the Decedent and her brother Frank acquired by reason of the death of the other brother Henry J. In the event that Frank predeceased Decedent leaving no issue him surviving and Decedent subsequently died leaving surviving issue (the actual events which subsequently occurred) (R. 29-33) the decree provided:

> "... if said Frank M. Witbeck ... die leaving him ... no issue or descendants of issue ... then the share of such decedent ... shall remain vested in said complaintants [the trustees] ... and upon the death of such survivor [Decedent] leaving ... her surviving issue or descendants of issue ... convey to such issue or descendants of issue in fee simple absolute, free, from said trust, the whole of said residue real estate." (R. 90)

Decedent's brother Frank died intestate, unmarried, divorced and without descendants on July 5, 1909. In 1914, his former wife, Minnie, brought suit in the Superior Court of Cook County for the assignment to her of dower in her former husband's share of his brother Henry J. Witbeck's original one-third of the trust real estate. (R. 32-33) The Superior Court sustained demurrers to Minnie's bill for

dower and she took an appeal to the Illinois Supreme Court. That court reversed the decree of the Superior Court sustaining the demurrers, remanded the cause to that court with direction to overrule the demurrers and for further proceedings in conformity with the views expressed in the opinion. *Aloe* v. *Lowe,* 278 Ill. 233, 115 N.E. 862 (1917) (R. 92-105).

On remand defendants answered, proof was taken and the Superior Court of Cook County then dismissed Minnie's complaint for want of equity. Minnie again appealed to the Illinois Supreme Court which reversed the decree of the Superior Court and remanded the cause with directions to enter a decree for Minnie for her dower and damages. *Aloe* v. *Lowe,* 298 Ill. 404, 131 N.E. 612 (1921) (R. 105-113)

On June 16, 1964 respondent commenced the instant suit for collection of estate taxes and interest thereon. At a pretrial hearing on November 19, 1969 the District Court denied cross-motions for summary judgment and asked that the case proceed to trial on stipulated facts. Counsel for petitioners advised the court that it was their intent to call an officer of the Chicago Title and Trust Company to establish the *fact* that immediately after her death the Title Company would sell a title policy guaranteeing marketable title to, and only to, Decedent's issue and would not sell a title policy to anyone else. Counsel for respondent then volunteered to stipulate to this fact. Counsel for petitioners then advised that they would want to call Mr. Gilbert Scribner, Jr., the senior member of a well-known real estate firm in Chicago, to establish that the effect of the Title Company's position on the *value* of Decedent's equitable interest would be to make that value zero. The court then suggested that Mr. Scribner's evidence be presented by affidavit, and no objection to this course of action was raised either by counsel for respondent or the court. Petitioners were reluctant not to

obtain the benefit of live testimony from Mr. Scribner who, in their opinion, would have been a very effective live witness. However, with the understanding that they would be permitted to introduce his evidence by way of affidavit, and with no suggestion that that evidence would be objected to, petitioners agreed to waive their right to call him as a live witness. (R. 117-18, 120) Petitioners entered into a Stipulation of Facts with respondent, a portion of which reads as follows:

> Immediately after the death of Grand-daughter Gertrude Hanlin the Chicago Title and Trust Company would have issued its policy guaranteeing marketable title to the real estate in question to, and only to, the same persons to whom the Trustees were directed to convey such real estate upon the death of Gertrude Hanlin in the aforementioned Circuit Court decree (exhibit C). Persons other than those named as distributees in that decree claiming title under a grant or devise by Gertrude would not have been able to furnish any potential buyer a Title Company policy guaranteeing marketable title.

and attached to their trial brief the affidavit of Gilbert Scribner, Jr. to establish the *fact* that the existence of the above stipulated *fact* would render the value of the interest sought to be taxed *zero*.

On October 30, 1970 the trial court entered its findings of fact, conclusions of law, memorandum order and judgment. (R. 128-131) The court adopted all of the stipulated facts as findings of fact, summarily granted respondent's motion to strike the affidavit of Gilbert Scribner, Jr. and found that the interest of the Decedent sought to be taxed was "absolutely certain to terminate upon her death". The court finally concluded that Decedent's interest was not subject to federal estate taxes. The trial court made no determination as to the value for federal estate tax purposes of the Decedent's interest.

From this decision the respondent appealed to the United States Court of Appeals for the Seventh Circuit. Petitioners cross-appealed the action of the trial court in striking the affidavit of Gilbert Scribner, Jr. On May 19, 1972, the Court of Appeals reversed the trial court's October 30, 1970 holding that Decedent's interest was not subject to federal estate taxes and remanded with directions to enter judgment for respondent.[1]

REASONS FOR GRANTING THE WRIT

I. IF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED THE ISSUE OF VALUATION AS BEING THE AMOUNT ASSESSED, THEN THAT DECISION CONFLICTS WITH THE VIEWS OF NUMEROUS COURTS OF APPEAL AS TO THE SCOPE OF THE RULE OF PRESUMPTIVE CORRECTNESS AS TO THE GOVERNMENT'S TAX ASSESSMENT.

The only evidence properly in the record on appeal as to the value of Decedent's interest was the evidence contained in the Stipulation of Facts. The Scribner Affidavit had been stricken but was the subject of petitioners' cross-appeal. It is agreed that the government's assessment of value is presumptively correct. However, that presumption disappears upon the introduction of any evidence tending to refute that presumption. *Clark* v. *Commissioner*, 266 F.2d 698 (9th Cir. 1959); *Niederkrome* v. *Commissioner*, 266 F.2d 238 (9th Cir. 1958), *cert. den.*, *Royce* v. *Commissioner*, 359 U.S. 945 (1959); *Fairmount Cemetery Ass'n.* v. *Helvering*, 79 F. 2d 163 (D.C. Cir. 1935); *Andrews* v. *Commissioner*, 135 F.2d 314 (2d Cir. 1943), *cert. den.*, 320 U.S. 748 (1943); *Polizzi* v.

[1] Petitioners filed a petition for re-hearing on the grounds that they had never had a judicial determination as to the value for federal estate tax purposes of Decedent's interest in the property which the Court of Appeals had held to be subject to federal estate taxes. The Court of Appeals denied that petition on June 29, 1972.

Commissioner, 265 F.2d 498 (6th Cir. 1959). The uncontroverted *fact* contained in the Stipulation of Facts that the Chicago Title and Trust Company would not issue its title insurance policy for the property in which Decedent held the interest to Decedent's devisees or grantees, shows that interest to be valueless. It is sufficient evidence, even without the Scribner Affidavit, to rebut the presumption. Consequently, the burden of proof as to the value of the interest shifted back to respondent, eliminating the assessment as evidence appropriate for the court to consider in determining value. Respondent, however, introduced no evidence other than the assessment.

Thus, respondent has utterly failed to meet its burden of proof and, in fact, petitioners have introduced uncontroverted evidence showing that the assessed valuation was inaccurate. If the Court of Appeals for the Seventh Circuit did decide the issue of valuation as being the amount assessed, it did so in conflict with the decisions of numerous other circuit courts of appeal and against the manifest weight of the evidence. Based on the evidence properly before it, the Court of Appeals for the Seventh Circuit, at minimum, should have remanded the cause for further proceedings as to the issue of value. To be sure, the Court of Appeals could, and should, have determined the interest to be valueless. To permit the government's assessment to control the issue of valuation where the taxpayer has presented evidence in contravention of that assessment, is contrary to every interpretation of the presumptive correctness rule as to tax assessments and, in this cause, is contrary to due process of law.

Throughout this litigation, respondent has argued that the position of the Title Company has significance on, and only on, the taxability of Decedent's interest which was the initial issue before the court. The record is perfectly clear,

however, that the stipulated fact of the Title Company's position was directed to, and only to, the question of the *value* of that interest if it were held to be taxable. Indeed, respondent knew the purposes for which the Title Company and Scribner evidence were offered prior to the time it stipulated to that fact (R. 120). Additionally, petitioners' purpose was clearly argued in every brief and oral presentation in this cause. The Court of Appeals, in suggesting that the interpretation by the Title Company was "immaterial" and therefore perhaps inadmissible, evidenced a woeful misunderstanding of this fundamental concept.

As a fact, therefore, and as a fact which does bear upon the issue of value, the statement of the position of the Title Company is indeed material, and, therefore, is properly part of the record. As such, it is sufficient to rebut the presumption of correctness of the assessment.[2]

II. IF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT DID NOT DECIDE THE ISSUE OF VALUATION, THEN, TO DATE, PETITIONERS HAVE BEEN DENIED THEIR RIGHT TO A HEARING ON THAT ISSUE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION.

It is irrefutable that the question of the valuation of Decedent's interest is, for federal estate tax purposes, a question of fact to be decided by the trier of fact. The record demonstrates that the trial court did not determine the issue of valuation of Decedent's interest. To be sure, evidence was submitted by petitioners on that issue but it is clear from the trial court's memorandum and opinion that it did not consider that evidence and rule on the issue of valuation. If,

[2] Likewise, the Scribner affidavit which constituted expert opinion evidence based on the stipulated Title Company position was also material as to value and should not have been stricken.

therefore, the Court of Appeals for the Seventh Circuit has not ruled on the issue of valuation, then, to date, petitioners have been denied their right to a determination of the issue of valuation by an appropriate trier of fact.

The Seventh Circuit's order remanding the cause for judgment against petitioners is ambiguous. In light of the Seventh Circuit's language, the District Court, upon remand, has no alternative other than to enter judgment for respondent in the amount of the assessment. Petitioners have been denied due process of law as contemplated in the Fifth Amendment to the Constitution. The decisions of this and other courts interpreting that amendment clearly establish that entry of a judgment against a party without a hearing and determination of the duly presented issues does not comport with the Fifth Amendment right to due process.

III. THE COURT OF APPEALS COMPLETELY DISREGARDED THE DECREE OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, DATED JULY 16, 1898, WHICH WAS ENTERED IN RESPONSE TO THE MANDATE OF THE SUPREME COURT OF ILLINOIS IN LOMBARD V. WITBECK. IN SO DOING THE COURT IMPROPERLY INTERPETED THE RULE OF LAW EXPOUNDED BY THIS COURT IN COMMISSIONER V. ESTATE OF BOSCH, 387 U. S. 456 (1967) TO BE THAT FEDERAL COURTS WILL NEVER UNDER ANY CIRCUMSTANCES BE BOUND BY A STATE TRIAL COURT ADJUDICATION OF PROPERTY RIGHTS EVEN WHEN THAT ADJUDICATION IS MADE IN RESPONSE TO THE MANDATE OF THE HIGHEST COURT OF THE STATE.

The action of the Court of Appeals raises an important question of federal law which has not been, but should be,

settled by the United States Supreme Court. As appears in the statement of the case, the 1898 decree of the Circuit Court of Cook County gave precise instructions to the Trustees with respect to their duties to convey the trust property under the circumstances which obtained on the death of Decedent. Under these circumstances the property was to be conveyed to her issue or descendants of issue. The Decedent under the precise terms of the 1898 decree could in no way control the devolution of the trust property after her death so that, in fact, her interest in it terminated on her death. Notwithstanding this fact, the Court of Appeals concluded on the basis of language in other Illinois Supreme Court decisions that Decedent did have the power to control the devolution of the property sought to be taxed. In so concluding the Court of Appeals interpreted this Court's decision in *Commissioner* v. *Estate of Bosch,* 387 U.S. 456 (1967) to mean that under no circumstances, even after review by the highest court of the State, will a state trial court decree be construed as conclusively binding on the federal courts.

Petitioners submit that this was not the intended result of the decision of this Court in *Estate of Bosch.* It is one thing to say that the adjudication of the trial court which has not been reviewed by the highest court of the State is not conclusively binding on federal courts. It is quite another thing to say that the adjudication of the trial court which has been reviewed at the level of the highest court and is entered in response to that court's mandate is not conclusively binding. If the interpretation of the Court of Appeals is allowed to stand the federal courts will be required to disregard all trial court adjudications and to make independent inquiry of the applicable state law.

IV. THE COURT OF APPEALS HAS CLEARLY MISCONSTRUED THE LAW OF ILLINOIS WITH REGARD TO DECEDENT'S POWER TO CONTROL DEVOLUTION OF THE INTEREST SOUGHT TO BE TAXED.

The only Illinois Supreme Court decision dealing with the question of the devolution of property forming a part of the Witbeck Trust was *Lombard* v. *Witbeck,* 173 Ill. 396, 51 N.E. 61 (1898). In response to the mandate of that decision, the Circuit Court of Cook County entered a decree on July 16, 1898, which specifically directed the Trustees to convey trust property to the Decedent's issue or descendants of issue surviving at her death if (as it happened) she were the last surviving of the three grandchildren and died leaving issue her surviving. That decree was never challenged directly or collaterally nor after it became final could it have been so challenged. That decree is the law of the case with respect to the devolution of the interest given to Decedent under the will of Henry Witbeck and was determinative of the issue of includability.

The Court of Appeals, in overruling this well-established case law, relied upon language in *Aloe* v. *Lowe,* 278 Ill. 233, 115 N.E. 862 (1917). The issue in *Aloe* was not to whom the Witbeck Trust property would ultimately go but was whether the Superior Court of Cook County had acted properly in dismissing the plaintiff's complaint on demurrers filed by defendants. The language seized on by the Court of Appeals as the basis for its decision that the Decedent's interest could be controlled by her and, therefore, was taxable was clearly dicta as to the issue before the court and could in no way affect the devolution of the property in the trust. If further confirmation of this situation is needed, it can be found in the decision of the Illinois Supreme Court when the *Aloe* case came to it a second time, *Aloe* v. *Lowe,* 298 Ill. 404, 131 N.E. 612 (1921). In that

decision the court examined the 1898 decree in detail and found that the directions to the Trustees as to the conveyance of the property of the trust at the termination thereof were in conformity with the mandate in *Lombard*.

In consequence of this gross misapprehension of Illinois law on the part of the Court of Appeals, the Decedent's interest in the trust was held to be taxable as part of her estate for estate tax purposes despite the fact that her interest under the 1898 decree terminated upon her death and she had no control over the devolution thereof.

Indeed, the Court of Appeals gave only summary consideration of *Lombard* and only briefly mentioned, as an aside, the 1898 decree of the Circuit Court of Cook County. The Seventh Circuit has completely ignored *Lombard* and the decree entered in response to, and in conformity with, that decision. Such summary consideration of a decision by the highest court of the State of Illinois violates this Court's decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

CONCLUSION

For these reasons, petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

FINDINGS OF FACT, CONCLUSIONS OF LAW, MEMORANDUM, ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS (ENTERED: OCTOBER 30, 1970)

CAMPBELL, Senior Judge.

This action was brought by the government for the collection of estate tax and interest alleged due from the estate of Gertrude Witbeck Hanlan, deceased April 11, 1952 (hereinafter referred to as decedent). Defendant Harris Trust and Savings Bank was the Executor of the estate and Trustee of five trusts created by the will of decedent. The other defendants are beneficiaries of the trusts and legatees under the will. All of the essential facts have been stipulated in a joint Stipulation of Facts filed by the parties. All of the facts so stipulated are adopted by the Court as Findings of Fact. All of the necessary facts and law are included in the Stipulation and in the briefs of the parties. The motions of the government to strike certain affidavits are granted and the same are ordered stricken. Defendants' motion for oral argument is denied as I find the position of the parties clear and their briefs full and complete.

Decedent had been an income beneficiary of a trust created by the will of her grandfather, Henry Witbeck who died April 11, 1881. A copy of that will is before the Court. Except for the trust estate, decedent had assets of only nominal value, which were exceeded by her liabilities and funeral expenses. The executors of the estate filed a federal estate tax return which disclosed her interest in the trust. The nature of her interest in that trust is the subject of this litigation. The government contends that a

portion of the trust res was includable in her estate for federal estate tax purposes. The executor and other defendants contend that her entire interest in the estate terminated at death and was, therefore, not includable in her estate for federal estate tax purposes.

As above stated, the trust in issue was created by the will of Henry Witbeck which was admitted to probate in 1891 in the Circuit Court of Cook County. The Trustees were to hold the trust assets for the benefit of Henry's three grandchildren Frank, Henry and Gertrude (decedent), income to be paid equally to the three grandchildren during their lives. As to the ultimate disposition of the trust estate, Henry's will provided:

> I further provide and direct that in case of the death of either of my said three grandchildren, Frank M. Witbeck, Gertrude H. Witbeck and Henry J. Witbeck, leaving issue or descendants of issue them surviving and born in lawful wedlock, the one third (1/3) share of all of my estate left for said last named three grandchildren shall descend to such issue or descendants of issue of each child so deceased, such issue and descendants of issue to take per stirpes and not per capita; and in case any one or more of said last named three grandchildren shall die without leaving any such issue or descendants of issue, then said one third (1/3) share of my said residue estate shall go to the survivor or survivors of said last named three grandchildren; and I further provide and direct that in case of the death of all three of said last named grandchildren without either of them leaving such issue or descendants of issue them surviving, then all of said estate hereby provided for such last named three grandchildren shall descend to my son John H. Witbeck and his heirs-at-law.

Grandson Henry died in 1896, intestate, unmarried and without issue. Frank died intestate in 1909. He was unmarried, but divorced. He left no issue. The Supreme

Court of Illinois held that Frank's former wife was entitled to dower in the share of her former husband in his brother's original one-third share of the trust real estate.

It is agreed that decedent's original one-third share taken under her grandfather's will was a life estate only. We are concerned only with the nature of her estate in the trust which she received on the death of her brothers. The original will of Henry Witbeck and the trusts created thereunder have been the cause of considerable litigation, resulting in three decisions of the Supreme Court of Illinois. Lombard v. Witbeck 173 Ill. 396 (1898); Aloe v. Lowe 278 Ill. 233 (1917); and Aloe v. Lowe 298 Ill. 404 (1921).

These decisions are discussed in detail in the excellent briefs filed by all parties. I believe a reading of these decisions is all but dispositive of the issues of this case. In this regard, I find the first decision of the Illinois Court, Lombard v. Witbeck Supra, to be the most relevant to the issues here. And, while that Court did not resolve the issue entirely, I find certain of its observations all but controlling:

> We think, however, that in the decision of each of the questions here raised the testator must be held to have intended that the interest of the survivor or survivors to accrue in a share or shares of one or more of the grandchildrn dying without issue or descendants of issue should be owned and enjoyed subject to the same restrictions and conditions upon which the original shares are given. We see no other way to give practical effect to the clearly expressed intention that in case of the death of all three without either of them leaving such issue or descendants of issue then surviving, then all of said estate thereby provided for such last named three grandchildren should descend to the son, John H. Witbeck, and his heirs-at-law. (173 Ill. 408-409).

It appears clear from the above, that the interest which accrued to decedent by virtue of the deaths of

her brothers without issue, were owned and enjoyed by her "subject to the same restrictions and conditions" as her original share and that interest was absolutely certain to terminate at her death.

I believe this is the only logical conclusion that can be reached from a reading of the will itself. I therefore find and conclude, independent of the conclusions of the Illinois Courts and to the extent that the Courts of Illinois have not resolved the issue, that upon the deaths of grandsons Henry and Frank, their interests in the property (except the dower interest of Frank's former wife) vested with the Trustees until the death of the last cestui que trust. Accordingly, decedent's interest, though sufficient by virtue of the 1917 decision in the Aloe case Supra to support dower, was absolutely certain to terminate upon her death, and one which she could not alienate by conveyance or devise.

I find nothing inconsistent with the opinion I express herein in the 1917 decision judicially creating a right to dower an an estate which would not otherwise support a right to dower, or in the 1921 decision. A careful reading of those cases indicates that the original decision in the Lombard case still stands.

Finally, I conclude that the interest of decedent in the subject properties was not subject to federal estate taxes.

Judgment shall enter accordingly, without costs.

/s/ Campbell
Senior Judge

APPENDIX B

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM, 1971—JANUARY SESSION, 1972

Nos. 71-1210, 71-1211

UNITED STATES OF AMERICA,
Plaintiff-Appellant-Cross Appellee,
v.
HARRIS TRUST & SAVINGS BANK, et al.,
Defendants-Appellees-Cross Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 64 C 1051
WILLIAM J. CAMPBELL, *Judge.*

ARGUED FEBRUARY 1, 1972—DECIDED MAY 19, 1972

Before SWYGERT, *Chief Judge,* KILEY and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* The primary question raised by this appeal is whether the district court erred in holding that at her death decedent's interest in a trust established by her grandfather was not includable in her estate for federal estate tax purposes.

Gertrude Witbeck Hanlin ("decedent") died testate on April 11, 1952, survived by five children. At the time of her death, decedent was the sole surviving income beneficiary of a trust created under the will of her grandfather, Henry Witbeck.

Except for her interest in the trust estate, decedent had assets of only nominal value which were exceeded by her liabilities and funeral expenses. In the year following decedent's death, Harris Trust and Savings Bank, decedent's

executor, filed a federal estate tax return. The executor disclosed the trust interest but took the position that it was only a life estate which terminated at her death and was not includable in her estate for federal estate tax purposes. The government included the trust interest and assessed federal estate taxes of $92,459.63 plus statutory interest against decedent's estate on August 23, 1956.

On June 16, 1964, the government filed this suit after an offer in compromise had been rejected by the government. On February 17, 1967, the district court dismissed the complaint on the ground that it was barred by the six-year statute of limitations governing tax collections. 267 F. Supp. 255. This court reversed and remanded, holding that the statute had been tolled until one year after the offer had been rejected. 390 F.2d 285 (1968).

The case was considered by the district court upon stipulated facts. On October 30, 1970, the district court held for the taxpayers, including the bank and the beneficiaries of trusts and legacies under decedent's will. The court concluded that the decedent's interest in the trust "was absolutely certain to terminate upon her death, and one which she could not alienate by conveyance or devise."

The government appealed; the taxpayers cross-appealed the district court's striking of two affidavits proffered by the taxpayers. We reverse the judgment holding the decedent's interest to be nontaxable and we affirm that portion of the judgment striking the affidavits.

The taxpayers do not dispute the government's contentions (1) that a life estate is not includable in a decedent's gross estate but that an inheritable interest, that is, property which can be transmitted by the decedent at death, is subject to the estate tax; (2) that the character of decedent's interest in the property is a question of state law; and (3) that in this case the decedent's original one-third trust interest was a life estate not subject to tax. The dispute arises as to the taxability of the two-thirds interest which accrued to decedent upon the death of her two brothers without issue.

Henry Witbeck died on April 12, 1891. By his will dated February 21, 1890, he bequeathed his residuary estate to three trustees to hold, manage and control as in their judg-

ment they deemed best for the use and benefit of his three grandchildren. Paragraph Nineteenth provided for the ultimate disposition of the trust estate as follows:

> "I further provide and direct that in the case of the death of either of my said grandchildren Frank M. Witbeck, Gertrude H. Witbeck and Henry J. Witbeck leaving issue or descendants of issue them surviving and born in lawful wedlock, the one-third (⅓) share of all of my estate left for said last named three grandchildren, shall descend to such issue or descendants of issue of each child so deceased, such issue and descendants of issue to take Per Stirpes and Not Per Capita and in case any one or more of said last named three grandchildren shall die without leaving any such issue or descendants of issue, then said one-third (⅓) share of my said residue estate shall go to the survivor or survivors of said last named three grandchildren. And I further provide and direct that in case of the death of all three of said last named grandchildren without either of them leaving such issue or descendants of issue them surviving, then all of said estate hereby provided for such last named three grandchildren shall descend to my son John H. Witbeck and his heirs at law."

One of the grandchildren named in the will, Henry J. Witbeck, died June 16, 1896, intestate, unmarried and without issue or descendants of issue. Another grandchild, Frank M. Witbeck, died July 5, 1909, intestate, unmarried and without issue or descendants of issue. However, Frank on September 12, 1894, had married Minnie, who divorced him on December 15, 1898.

The third grandchild, Gertrude H. Witbeck, died April 11, 1952, leaving no spouse but five children. The death of each grandchild named in the 1890 will of Henry Witbeck resulted in litigation.

Henry's estate had included real estate valued at $500,000 and personal property worth $240,000. When the first grandchild, Henry J., died in 1896, the trustees filed a bill in chancery in an Illinois court seeking a construction of Henry's will. They asked particularly what disposition should be made of the one-third share of real and personal

property willed to Henry J. The chancellor held that the real estate should descend to the surviving grandchildren, Frank and Gertrude, in equal shares as tenants in common, in fee determinable upon the death of both tenants leaving no issue or descendants of issue, and that the personal estate should descend to them in equal shares absolutely.

On appeal, the Supreme Court of Illinois in *Lombard* v. *Witbeck*, 173 Ill. 396, 51 N.E. 61 (1898), ruled out the possibility that the interest involved was a fee simple interest. The court added that, whether it "would be a fee determinable or a mere life estate, is not, in the view we take of the case, important." 173 Ill. at 407. The supreme court affirmed the lower court as to the personalty, but as to the realty held that it should remain subject to the control of the trustees, with eventual disposition to await the death of the remaining grandchildren either with or without issue surviving.[1] The effect of the decision was that the two surviving grandchildren could not take their brother's one-third share of the trust realty in fee simple free of the trust at his death as they had contended. The supreme court indicated that its diverse treatment of realty and personalty was based on the fact that, while Paragraph Twentieth of the Henry Witbeck will authorized the trustees to invade the corpus of the personal estate as "they may deem best" for the benefit of the three grandchildren, "in no case shall any part of the real estate left by me for their use and benefit, or the proceeds thereof if sold, be advanced or conveyed to said grandchildren or any of them during their lifetime."

After Frank M. Witbeck, the second grandchild, died in 1909, his former wife, Minnie C. Aloe, filed a bill in chancery in an Illinois court for assignment of dower in the undivided one-half (Frank's one-third interest plus his one-half of the one-third interest of his brother, Henry J.) of the base or determinable fee of which she claimed Frank had been seized during coverture under the will of Henry Witbeck. The lower court dismissed the bill for want of equity.

The Illinois Supreme Court reversed the lower court in *Aloe* v. *Lowe*, 278 Ill. 233, 115 N.E. 862 (1917). The court

[1] The supreme court said, however, that "ordinarily the language used in this will would lead to the conclusion that the surviving brother and sister took an estate in fee determinable upon both dying leaving no issue or descendants of issue." 173 Ill. at 408.

first construed its earlier opinion in *Lombard* v. *Witbeck* and concluded:

> "From the language of the opinion in that case and the authorities referred to we think it is clear that this court agreed with the holding of the lower court that the language of the nineteenth clause created a base or determinable fee in Frank M. Witbeck and Gertrude H. [Witbeck] Grice in the equitable share of the estate which would have gone to the issue of Henry J. had he died leaving issue." 278 Ill. at 237-38.

The supreme court, alluding to "some confusion" between base or determinable fees as distinguished from life estates, concluded the only difference was that "in case of a fee determinable the owner can convey or devise his interest, and if the event does not happen which will cut down his fee simple to a base or determinable fee, such devise or conveyance will be good and effectual to transfer title to the property so held." 278 Ill. at 238-39.

The supreme court then interpreted the 1890 Witbeck will as follows:

> "Each one of said grandchildren takes a life estate in one-third of the residue, and if any of them die leaving issue such one-third goes to them; if one of them dies without leaving issue or descendants of issue such one-third share goes to the two survivors; and if one of the other two dies without issue such share so inherited by him goes to the other survivor. *In case the third grandchild dies leaving issue, such issue will take one-third of the residuary estate under the first part of the nineteenth clause as a remainder in fee, and they would take the other two-thirds by descent, unless their parent had in the meantime devised or conveyed such one-third.*" 278 Ill. at 240-41.

The emphasized portion of the court's interpretation is exactly what occurred in the present case upon decedent's death in 1952: Decedent's issue took one-third of the trust as a remainder in fee following their mother's life estate. They took two-thirds of the trust by descent, whereupon the base of determinable fee in that two-thirds became a fee simple interest.

The Illinois Supreme Court in *Aloe* v. *Lowe* then proceeded to hold that the one-sixth interest which Frank took upon the death of his brother, Henry J., was a base or determinable fee in real estate. The interest, which "is an estate of inheritance and descends to the heirs-at-law of the owner thereof," was one in which Frank's former wife, Minnie, was entitled to dower.

On remand to the lower Illinois court, an answer to the bill was filed, denying that Frank's interest was a determinable fee and setting up in defense a copy of the decree entered by the lower state court in 1898 on remand of *Lombard* v. *Witbeck*. The trial court set aside the jury verdict for Minnie and dismissed the bill for want of equity, on the ground that the 1898 decree had interpreted the will to make Frank's interest a life estate in which Minnie would not be entitled to dower.

The Illinois Supreme Court heard Minnie's second appeal in *Aloe* v. *Lowe*, 298 Ill. 404, 131 N.E. 612 (1921). The court began its opinion with a clear and unambiguous statement of the holdings in both *Lombard* and *Aloe I*:

> ". . . [Frank's one-sixth interest from Henry J.] was held to be a determinable fee in Lombard v. Witbeck, 173 Ill. 396, and on a former appeal in this cause. (Aloe v. Lowe, 278 Ill. 233.) . . . In both these cases it was held that Frank M. Witbeck took an equitable, determinable fee in the portion of his [grand]father's estate in controversy here." 298 Ill. at 405-06.

The supreme court then considered the basis upon which the lower court had set aside the jury verdict, which is the same argument which taxpayers make in the present case:

> "The appellees' contention is that the circuit court, upon remandment, decreed that Frank M. Witbeck had only a life estate and not a determinable fee, and that this decree, however erroneous, is binding on the complainant since no attempt was ever made to correct it. . . .
>
> "It must be presumed, however, that it was the intention of the circuit court, as it was its duty, to observe

the mandate of this court and enter a decree in accordance with it and not a different decree. . . .

"These provisions of the decree do not purport to define the character of the estate. . . . The directions to the trustees were in conformity with the opinion on the appeal without reference to the character of the estate, and the general statement that the estate is held upon the same trusts and with the same powers and duties as the original shares is qualified and limited by the specification of the particular powers and duties, which are in conformity with the opinion upon the appeal and the mandate." 298 Ill. at 407-08; 411-12.

The supreme court then reversed the lower court and remanded the cause with directions to enter a decree for the appellant for her dower and damages.

In summary, the Illinois Supreme Court has on three separate occasions declared that the same will involved in the present case is to be interpreted to result in two-thirds of decedent's trust estate being a base or determinable fee, an estate of inheritance, subject to conveyance or devise or descent, and subject to dower. The only conceivable argument contrary to this interpretation was fully presented to and considered by the Illinois Supreme Court in its last opinion on the subject. It was clearly erroneous for the district court to conclude otherwise, in disregard of the Illinois opinions.

Since we conclude that as a matter of law[2] the two-thirds interest in the Witbeck trust which decedent took upon the death of her two brothers is includable in her gross estate for estate tax purposes, the interpretation a title company or a practicing attorney would give to the wills in affidavits is immaterial. We therefore affirm only the striking of the affidavits. The balance of the judgment of October 30, 1970, is reversed and remanded with directions to enter judgment for the government. We have considered the other points raised by the taxpayers, including the contention that the

[2] The law of the case has been established by the Illinois Supreme Court. See *Barrett* v. *Baylor*, No. 71-1158 (7th Cir., March 14, 1972) slip op. 6-8. The individual defendants in this case or their predecessors in interest were also parties in the three Illinois cases.

government failed to comply with procedural requirements, and find them to be without merit.

AFFIRMED IN PART;

REVERSED IN PART;

REMANDED WITH DIRECTIONS.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-503

HARRIS TRUST AND SAVINGS BANK, individually, as Executor of the Estate of Gertrude Witbeck Hanlin and as Trustee, EVELYN P. GRICE, MARY T. GARVEY, JOHN A. LOWELL, II, BONNIE TORREY BERTKE, CLARENCE T. TORREY, JR. and MARGARET TORREY MCGRATH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1-4) is unofficially reported at 26 A.F.T.R. 2d 6089. The opinion of the court of appeals (Pet. App. 5-12) is unofficially reported at 29 A.F.T.R. 2d 1568.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1972. A petition for rehearing was denied on June 29, 1972. The petition for a writ of certiorari was

filed on September 27, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether decedent possessed, at the time of her death, an interest in a trust created by her grandfather which was includible in her estate for federal estate tax purposes.

2. Whether the court of appeals was correct in reversing and remanding the district court's judgment with instructions to enter judgment in favor of the government, rather than remanding the case for further factual findings.

STATUTE INVOLVED

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * * * *

STATEMENT

Decedent died testate on April 11, 1952, survived by five children. At the time of her death, decedent was the sole surviving income beneficiary of a trust created

by the will of her grandfather, Henry Witbeck, who died April 12, 1891. Decedent's executors filed a federal estate tax return which disclosed her interest in the trust, but they took the position that her interest was only a life estate, which terminated at her death and was therefore not includible in her estate for federal tax purposes. A deficiency was subsequently assessed for unpaid estate taxes on the ground that under Henry Witbeck's will, decedent possessed more than a life estate in the trust as of her death, and that indeed she owned a substantial portion of the trust res. (Pet. App. 1-2, 5-6.)

Witbeck's will provided that, with the exception of certain specific bequests, his entire estate was to be held in trust for the benefit of his wife, his son John, John's two children, and the three children of his deceased son George. George's children—Frank, Henry, and Gertrude (the decedent herein)—were named as the residuary legatees under the trust, with net income to be paid equally to the three of them as the trustees deemed in their best interest. Article 19 of the will directed the ultimate disposition of the trust estate as follows (Pet. App. 2, 7):

> I further provide and direct that in case of the death of either of my said three grandchildren Frank M. Witbeck, Gertrude H. Witbeck and Henry J. Witbeck leaving issue or descendants of issue them surviving and born in lawful wedlock, the one-third (1/3) share of all of my estate left for said last named three grandchildren, shall descend to such issue or descendants of issue of each child so deceased, such issue and descendants of issue

> to take Per Stirpes and not Per Capita *and in case any one or more of said last named three grandchildren shall die without leaving any such issue or descendants of issue, then said one third (1/3) share of my said residue estate shall go to the survivor or survivors of said last named three grandchildren.* And I further provide and direct that in case of the death of all three of said last named grandchildren without either of them leaving such issue or descendants of issue them surviving, then all of said estate hereby provided for such last named three grandchildren shall descend to my son John H. Witbeck and his heirs at law. [Emphasis added.]

The ambiguities attendant in the above-cited language gave rise to three Illinois Supreme Court decisions interpreting the Witbeck will. Upon the death of the first grandchild, Henry J. Witbeck, on June 16, 1896, intestate, unmarried, and without children, the trustees brought a construction suit to determine the disposition of grandson Henry's one-third interest in the property of the trust. The suit was brought to the Illinois Supreme Court and decided in *Lombard* v. *Witbeck*, 173 Ill. 396, 51 N.E. 61. The court held that Henry's share of trust personal property should descend to the two remaining grandchildren, absolutely, in equal parts. With respect to Henry's share of real property, however, the enjoyment of which was governed by a spendthrift clause, the court held that it was to remain subject to the control of the trustees, with eventual disposition to depend upon whether the remaining grandchildren died leaving issue. The court noted that

it did not need to resolve the question whether the survivors' interest was merely a life estate or a fee simple determinable (an interest which would ripen into a fee simple interest upon the death of either of the surviving grandchildren with children surviving them), since the only question at issue concerned the immediate disposition of the property. (Pet. App. 8.)

In 1909, Frank M. Witbeck, the second of the Witbeck grandchildren, died unmarried and without having had children. In 1898, his former wife Minnie had divorced him, and subsequently brought suit for the assignment to her of dower in her former husband's one-half share of grandson Henry's original one-third share of the trust real estate. (Pet. App. 7, 8.) The Illinois Supreme Court considered her claim in *Aloe* v. *Lowe*, 278 Ill. 233, 115 N.E. 862, which required that court to face squarely the question of the nature of the accrued interests held by the grandchildren. Under the Illinois Dower Act, the court noted, a surviving husband or wife could be awarded dower only where the deceased spouse was seized of an "estate of inheritance" during marriage—i.e., where property which was held by the deceased spouse was capable of being transmitted by him either inter vivos or at death. The court examined its prior opinion in *Lombard* and concluded (278 Ill. at 237-238, 115 N.E. at 864) that the language of the nineteenth clause of the will "created a base or determinable fee in Frank M. Witbeck and Gertrude H. Grice in the equitable share of the estate which would have gone to the issue of Henry J. had he died leaving issue." The court further noted that *Lombard* had decided the question

of the use of the property and not the nature of the underlying ownership interest held by the beneficiaries (278 Ill. at 238, 115 N.E. at 864). Finally, the court examined the effect of the gift over to the grandchildren's uncle upon the death of all three without issue surviving and the status of the accrued shares of each surviving grandchild who died with issue surviving (278 Ill. at 240-243, 115 N.E. at 865):

> This last provision is in the nature of an executory devise, and its effect is to cut down the devise just preceding from a fee simple devise to a base or determinable fee. These contingencies are thus provided for: Each one of said grandchildren takes a life estate in one-third of the residue, and if any of them die leaving issue such one-third goes to them; if one of them dies without leaving issue or descendants of issue such one-third share goes to the two survivors; and if one of the other two dies without issue such share so inherited by him goes to the other survivor. *In case the third grandchild dies leaving issue, such issue will take one-third of the residuary estate under the first part of the nineteenth clause as a remainder in fee, and they would take the other two-thirds by descent, unless their parent had in the meantime devised or conveyed such one-third.* In case all die without leaving issue surviving, the residue all descends to the heirs-at-law of John H. Witbeck.
>
> * * * * *
>
> A base or determinable fee in real estate is an estate of inheritance and descends to the heirs-at-

> law of the owner thereof, and, as before stated, the interest which Frank M. Witbeck inherited from his brother would have descended to his children if he had left any children and had not devised or conveyed such interest. It was a fee simple estate in him, subject to be determined by his dying without leaving issue or descendants of issue and a freehold of inheritance.* * * [Emphasis added.]

Since Frank's interest in Henry's share of the trust real estate was devisable by will and thus an "estate of inheritance," the court held that Minnie had a right to dower in this one-sixth interest.

Four years later, the Illinois Supreme Court was again faced with Minnie's right to dower in *Aloe* v. *Lowe,* 298 Ill. 404, 131 N.E. 612. On remand to the circuit court from the first *Aloe* opinion, the defense of *res judicata* had been successfully interposed against Minnie's claim on the basis of the earlier circuit court decree entered in conformance with the original *Lombard* opinion. In rejecting the lower court's rationale and result, the Illinois Supreme Court in the second *Aloe* opinion, leaving no doubt as to the meaning of its two previous decisions (298 Ill. at 405, 131 N.E. at 613), again held that the equitable interest of Frank M. Witbeck under the will of Henry Witbeck in the one-half of the one-third interest in certain real estate devised to Henry J. Witbeck, after the latter's death, was a determinable fee.

On June 16, 1964, the present suit was brought by the United States to collect the estate taxes assessed against decedent's estate. On February 17, 1967, the district court granted petitioners' motion to dismiss on

the ground that the government's complaint was barred by the statute of limitations. On appeal, the court of appeals held that the statute of limitations had been tolled during the pendency of an offer in compromise submitted by petitioners and that the government's suit had been timely filed. *United States* v. *Harris Trust and Savings Bank,* 390 F.2d 285 (C.A. 7), rehearing denied, March 11, 1968.

On remand, the district court denied the petitioners' motion for summary judgment and the government's motion for partial summary judgment and ordered that the case proceed to the merits on a stipulation of facts and briefs. The government moved to strike the affidavit of Daniel M. Schuyler (an opinion that as a matter of law decedent had only a life interest), a paragraph in the stipulation of facts referring to a hypothetical action of the Chicago Title and Trust Company, and the affidavit of Gilbert H. Scribner, Jr. (expressing his opinion as to the effect of the title company's hypothetical action on the value of the trust real property). In its Findings of Fact, Conclusions of Law, Memorandum, Order and Judgment, the district court granted the government's motion to strike the affidavits, but apparently took no action with respect to the stipulated paragraph.

The court entered judgment in favor of petitioners, holding that decedent's interest in the Witbeck trust "was absolutely certain to terminate upon her death, and one which she could not alienate by conveyance or devise" (Pet. App. 4) and that therefore she possessed no interest at her death properly includible in her estate for federal estate tax purposes. In view of the court's

disposition of this issue, it was not necessary for it to determine the value of decedent's asserted two-thirds interest in the Witbeck trust.

The court of appeals reviewed the decisions of the Illinois Supreme Court and held that the state court (Pet. App. 11)—

> has on three separate occasions declared that the same will involved in the present case is to be interpreted to result in two-thirds of decedent's trust estate being a base or determinable fee, an estate of inheritance, subject to conveyance or devise or descent, and subject to dower.* * *

This alienable interest, the court ruled, was properly includible in decedent's estate. Having so ruled, the court noted that the interpretation of the will made by a title company or a practicing attorney was immaterial and thus affirmed the striking of the affidavits. The court reversed and remanded with instructions to enter judgment for the government.

ARGUMENT

The decision below is correct and in accord with the mandate of this Court in *Commissioner* v. *Estate of Bosch,* 387 U.S. 456. The decision turns largely on the court's interpretation of state law and presents neither a conflict nor other reason for further review.

1. The decision below resolves a narrow question of Illinois law, with all other issues left undisputed by the parties. It has been stipulated by the parties (1) that decedent's original one-third interest in the Witbeck trust is a life estate, which cannot be included in

her estate; (2) that the nature of decedent's interest in the two thirds of trust corpus which passed to her upon the death of each of her brothers without leaving issue surviving is a question of state law to be determined by federal courts in accordance with the instructions of this Court in *Commissioner* v. *Estate of Bosch*, *supra*; and (3) that if decedent was able to control the disposition of this two-thirds interest in the Witbeck trust by will, then the value of that interest must be included in her gross estate for federal estate tax purposes.

As outlined above, the Illinois Supreme Court has never considered the very provisions of the Witbeck will at issue in the present case. In *Lombard* v. *Witbeck*, 173 Ill. 396, 51 N.E. 61, the court specifically declined to rule on the question whether the interest passing from a deceased grandchild to the survivors among them was to be held as a life estate or as a fee simple determinable—an interest capable of ripening into a fee simple absolute upon the death of the surviving grandchildren leaving living issue. In the two subsequent *Moss* v. *Lowe* cases, *supra*, however, the court did address itself directly to the question at issue in order to decide if Frank Witbeck, the second grandchild to die, had an estate of inheritance subject to conveyance or devise in which his former wife was entitled to dower. The court there held that Frank's interest in the share of trust property passing from his brother was a fee simple determinable rather than a life estate. In so holding, the court specifically re-

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Moss v. *Lowe*, 275 Ill. 230, 113 N.E. 962; *Moss* v. *Lowe*, 286 Ill. 404, 121 N.E. 682.

jected the argument raised by petitioners here (Pet. 10-13) that the 1898 circuit court decree fixed forever the devolution of trust property in a manner inconsistent with taxability in the instant case. Far from misapplying the guidelines of *Bosch* to the circumstances here, the court of appeals was clearly obligated to follow the interpretation of the Witbeck will enunciated and reiterated by the Illinois Supreme Court in its 1917 and 1921 opinions in *Aloe* v. *Lowe*, *supra*. Decedent, by leaving surviving issue, possessed a fee simple interest, includible in her gross estate.

2. Petitioners also challenge the court's action below in ordering judgment to be entered in favor of the government. The district court ordered that the case proceed to the merits on a stipulation of facts and briefs. In order to prove that even if decedent's interest in the Witbeck trust real property was taxable it had no value at the time of her death, petitioners relied upon (1) a paragraph in the parties' stipulation to the effect that a certain title company would not have issued a policy guaranteeing marketable title to any devisee of the decedent other than her children per stirpes and (2) the affidavit of a real estate expert stating that without such title insurance the fair market value of the trust real property was zero. Petitioners made no alternative argument, either at trial or on appeal, that the value of the trust real property, or the value of the trust personal property held as the proceeds of the sale of real property, employed by the Commissioner in assessing the estate tax deficiencies was erroneous in any respect, other than that it had not been reduced to zero.

The district court did not reach the question of valuation. On appeal, however, the government argued that if the substantive legal question were resolved in its favor and decedent were held to have had an alienable interest in two thirds of the corpus of the Witbeck trust, then judgment should be entered in the amount of the assessed deficiencies, since the legal basis of the hypothetical assumption that the title company would refuse to insure title would be removed. Under these circumstances, the presumptive correctness of the Commissioner's determination would remain unchallenged and judgment in the amount of the assessed deficiencies would be proper. See, *e.g.*, *Barnes* v. *Commissioner*, 408 F.2d 65, 68 (C.A. 7), certiorari denied, 396 U.S. 836, and cases cited therein. Petitioners, too, invited the court of appeals, in their briefs before that court, to make a final determination as to the value of decedent's interest in the trust real property. Presented with the case in this posture, the court below resolved all underlying legal questions favorably to the government and ordered that judgment be entered in its favor. At that point petitioners, for the first time in a petition for rehearing, argued that the case be remanded for further proceedings on the issue of valuation—suggesting, apparently, that some intermediate value between zero and the assessed valuation might be found. That petition was denied.

The court of appeals acted well within the bounds of proper judicial discretion in ordering judgment to be entered in favor of the government. It may appear, with the aid of hindsight, that petitioners would have been better advised in both the district court and in the

court of appeals to have introduced evidence or to have made an alternative argument either challenging the valuations of trust property employed by the Commissioner or establishing the existence of a cloud upon decedent's date-of-death title to the property which would render her interest less valuable. Petitioners, however, chose to gamble on an all-or-nothing approach. The court of appeals, having found the legal basis of petitioners' factual argument rendered immaterial by its primary holding, was thus faced with a situation in which the presumed correctness of the Commissioner's assessed deficiencies remained unchallenged. See, *e.g.*, *Barnes* v. *Commissioner*, *supra*. Petitioners may not now avoid the result which they specifically invited by their own litigating strategy. Cf., *Helvering* v. *Cement Investors, Inc.*, 316 U.S. 527; *Helvering* v. *Wood*, 309 U.S. 344; *Carr* v. *Federal Trade Commission*, 302 F.2d 688 (C.A. 1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1972.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

HARRIS TRUST AND SAVINGS BANK, individually, as Executor of the Estate of Gertrude Witbeck Hanlin and as Trustee; EVELYN P. GRICE, MARY T. GARVEY, JOHN A. LOWELL, II, BONNIE TORREY BERTKE, CLARENCE T. TORREY, JR. and MARGARET TORREY McGRATH,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

No. 72-503

October Term, 1972

HARRIS TRUST AND SAVINGS BANK, individually, as Executor of the Estate of Gertrude Witbeck Hanlin and as Trustee; EVELYN P. GRICE, MARY T. GARVEY, JOHN A. LOWELL, II, BONNIE TORREY BERTKE, CLARENCE T. TORREY, JR. and MARGARET TORREY McGRATH,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The instant petition for Writ of Certiorari is grounded upon violation of the due process clause of the Fifth Amendment.

Petitioners, the taxpayers, claim that they have been denied "due process of law" in that in this highly technical tax litigation they have been denied a hearing and there

has been no finding with respect to the question of the valuation of the taxed property. With this position the Solicitor General agrees! Government's Brief, first sentence, p. 12 which reads: **"The District Court did not reach the question of valuation."** (Emphasis ours).

While it is quite true that the technical tax issues (except for the *Bosch* issue) involved in this litigation do not warrant review by this Court, nevertheless the denial of due process whether it be in criminal cases or in highly technical tax litigation is, we submit, of paramount importance. That importance is highlighted because the violation is admitted by the Government. No question in our judicial system is of more importance. Indeed the Government's handling of the litigation created the violation.

The Solicitor General's statement that the denial of due process resulted from the taxpayers' " . . . own litigating strategy" is shocking. (Government's Brief, last sentence, p. 13). Not only does the Government urge that taxpayers are not entitled to a hearing on valuation, but, in addition, they seek refuge in the position that the Department of Justice succeeded in trapping the taxpayers into a stipulation from which the Government has withdrawn and with regard to which withdrawal the trial court ". . . took no action." (Government's Brief, para. 2, p. 8 next to last line). The attorneys for the Tax Division completely ignore the factual error made by the Seventh Circuit in its affirmance of the trial court's striking of not only the supporting affidavit of taxpayers' real estate expert but also in effect its striking of the Government's stipulation. The facts to which the Government stipulated form the basis for a determination with respect to the value of the assessed

property. The Government has without any justification whatsoever withdrawn from the stipulation. The stipulated facts by themselves even without the affidavit of taxpayers' real estate expert override, negate, remove and eliminate the so-called presumptive correctness of the IRS's determination of value.

On the one hand the Government stipulated to facts bearing upon valuation, however, having won the threshold issue of includability, they now retreat from that stipulation. The Government seeks to have the Court bind it and taxpayers only to that part of the stipulation bearing on the fact that an assessment was made and is, therefore, presumptively correct. The Government having succeeded on the threshold issue of includability now seeks to eliminate from the stipulation the agreed to evidence bearing on valuation which agreed to evidence, by law, overrides that elusive presumption of correctness upon which all IRS assessments ride.

In summary, the trial court found that the assessed interest was not includable in the decedent's estate for estate purposes. Having so found it was not necessary for it to nor did it reach the question of valuation. The Seventh Circuit ruled against taxpayers and for the Government on the issue of includability and like the trial court never reached the question of valuation. The taxpayers are entitled, under the due process clause, to a hearing not only with regard to *includability* but also with regard to *valuation*. The Government, having succeeded on the threshold issue, is now urging that taxpayers are foreclosed from their hearing on the ultimate issue. The Government's Brief completely fails to explain why. There is no explanation.

CONCLUSION

The underlying tax questions (except the *Bosch* question) presented in the instant case are unimportant, other than to those affected, and, therefore, do not warrant review by this Court. However, the cavalier position taken by the Solicitor General with regard to the due process issue which position was adopted by the Seventh Circuit is of paramount importance and not only warrants but requires review.

We respectfully pray that this Court grant *certiorari.*

Respectfully submitted,

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